



April 10, 2000

Ms. Lilia Ledesma-Gonzalez
Law Office of James E. Darling
3319 North McColl Road
McAllen, Texas 78501

OR2000-1405

Dear Ms. Ledesma-Gonzalez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 134155.

The City of McAllen (the “city”) received a request for information regarding disciplinary actions rendered against police officers from January 1998 to the present. Specifically, the requestor seeks documents pertaining to the complaint filed against each officer, the findings regarding each complaint, and the final disposition or disciplinary action taken against each officer. You claim that all of the requested information is excepted from required public disclosure under 552.102 of the Government Code, and alternatively, that a portion of the requested information is excepted under section 143.089 of the Local Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of the information at issue.¹

¹In reaching our conclusion, we assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision No. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

We begin by addressing your argument that all of the requested information is excepted under section 552.102 of the Government Code. Section 552.102(a) protects “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy” The scope of section 552.102(a) protection, however, is very narrow. *See* Open Records Decision No. 336 (1982). *See also* Attorney General Opinion JM-36 (1983). The test for section 552.102(a) protection is the same as that for information protected by common law privacy under section 552.101 of the Government Code: the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

The submitted representative sample consists of disciplinary records from various police officers' personnel files. There is a legitimate public interest in the work behavior of public employees and how they perform job functions. Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 444 (1986) (employee information about qualifications, disciplinary action, and background not protected by privacy), 423 at 2 (1984) (scope of public employee privacy is narrow), 405 (1983) (employee performance audit not protected by privacy), 284 (1981) (letters of recommendation not protected by privacy). Therefore, we find that none of the requested information may be withheld based on a right of privacy. Accordingly, the city may not withhold any of the requested information under section 552.102.

Next, we turn to your argument that “Part One” of the submitted information is excepted under section 143.089 of the Local Government Code. Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Accordingly, section 552.101 encompasses confidentiality provisions such as section 143.089(g) of the Local Government Code.

Section 143.089 of the Local Government Code sets out rules governing the content and release of two types of personnel files maintained by municipal fire and police departments. The first category is mandatory. “The director or director's designee shall maintain a personnel file on each fire fighter and police officer.” Gov't Code § 143.089(a). This mandatory file must contain “any letter, memorandum, or document *relating to*: . . . (2) any misconduct by the fire fighter or police officer if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter.” Gov't Code § 143.089(a)(2) (emphasis added). Release of information contained in this mandatory file is governed by subsections 143.089(e) and (f) which state:

(e) The fire fighter or police officer is entitled, on request, to a copy of any letter, memorandum, or document placed in the person's personnel file. . . .

(f) The director or the director's designee may not release any information contained in a fire fighter's or police officer's personnel file without first obtaining the person's written permission, unless release of the information is required by law.

Because information contained in this type of file may be released on the basis of other law or the person's consent, this information is not confidential and is therefore subject to the Texas Public Information Act (the "Act"), chapter 552 of the Government Code. Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990).

The second type of file described in section 143.089 is discretionary. "A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use" Local Gov't Code § 143.089(g). The information contained in this type of file is confidential. "[T]he department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. . . ." Local Gov't Code § 143.089(g); *see also City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.--Austin 1993, writ denied).

The city has apparently adopted chapter 143 of the Local Government Code, and, therefore, the city police department is authorized to maintain internal files on its police officers. You argue that the responsive information represented by "Part One" of the submitted materials is maintained in the police department's "discretionary files" pursuant to section 143.089(g).² Therefore, you argue that the responsive information represented by "Part One" is confidential under section 143.089(g). We have reviewed the information contained in "Part One," and find that it seems to contain records pertaining to disciplinary proceedings in which no disciplinary action resulted. Consequently, the city must withhold the types of records contained in "Part One" under section 143.089(g) as encompassed by section 552.101.³

²In contrast, you concede that the responsive information represented by "Part Two" of the submitted materials is maintained in the police departments' "civil service files." In other words, the type of information submitted as "Part Two" is maintained by the police department's "mandatory files" under section 143.089(a), and is therefore not subject to the confidentiality provision of section 143.089(g). Accordingly, the type of information contained in "Part Two" is subject to the Act. Except for section 552.102, which is inapplicable as explained above, you do not raise any exceptions in regard to the responsive information represented by "Part Two."

³Because it is difficult for us to determine with certainty whether any of the disciplinary proceedings reflected by the records in "Part One" actually resulted in disciplinary action, we emphasize that all responsive records pertaining to disciplinary proceedings which did result in disciplinary action are subject to release under the Act.

In conclusion, the city may not withhold any of the requested information under section 552.102 of the Government Code. However, the city must withhold the type of information contained in "Part One" of the submitted documents under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. Finally, the city must release the types of documents contained in "Part Two" of the submitted information except for any information that is confidential by law.⁴

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

⁴We found no confidential information in the documents submitted as "Part Two."

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "E. Joanna Fitzgerald".

E. Joanna Fitzgerald
Assistant Attorney General
Open Records Division

EJF/nc

Ref: ID# 134155

Encl. Submitted documents

cc: Ms. Victoria Guerra
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(w/o enclosures)